PUBLIC PROSECUTOR

v.

OOI LEAN CHAI

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[CRIMINAL TRIAL NO. 47-11-90]
12 JULY 1990

CRIMINAL PROCEDURE: *Evidence - Retrial from Supreme Court - Admissibility of chemist report served in earlier trial and tendered at present trial - Chemist not called - No notice of objection by defence Counsel - Reference to drug which is not subject of present trial - Section 399 Criminal Procedure Code.*

EVIDENCE: *Admissibility of chemist report served in earlier trial - Reference to drug which is not subject of present trial - Necessity of service - No notice of objection by defence - Section 399 Criminal Procedure Code.*

This case is a retrial ordered by the Supreme Court after a successful appeal by the accused in his first trial. In this retrial the accused was charged with an offence under s. 39B(1) of the Dangerous Drugs Act 1952 (the Act) in relation to heroin; in the 1st trial the accused was found guilty of a similar charge under s. 39(B)(1) in relation to heroin and 6 - monoacetylmorphine (M), which latter drug was at the material time not listed as a dangerous drug. The chemist report tendered at the retrial was also tendered at the 1st trial, the last page of the report contained a statement to the effect that M was a dangerous drug (which it wasn't at that time; it has since been listed as a dangerous drug). The present charge excludes reference to M and the accused is charged only with trafficking in heroin.

The issue for the Court was the admissibility of the chemist report taking into account the fact that the chemist was not called to testify and the fact that the report had been served or the defence in the 1st trial and was not reserved in this retrial.

Held:

[1] A careful reading of s. 399 of the Code shows that there is no necessity for the prosecution to reserve the chemist report on the accused at the retrial.

[2] In the report, the analysis of heroin and M are clearly distinguished, as this case concerned only heroin, the chemist report is clear and to the point on this matter.

[3] After careful consideration of all the evidence before the Court, the accused has failed to rebut firstly, the presumption that the drugs were for his own personal consumption and secondly, the presumption of trafficking.

[Accused found guilty.]

Cases referred to:
Mohamed bin Abdul Rahman v. PP [1979] 1 MLJ 252
Cohen Lorraine Philis & Anor. v. PP [1989] 1 CLJ (Rep) 18

Legislation referred to:
Criminal Procedure Code, s. 399
Dangerous Drugs Act 1952, ss. 2, 39B(1), (1)(a), (2)

For the prosecution - Tan Poh Lai, DPP
For the accused - Teh Poh Teik; M/s. Abdul Rahman Saad & Associates

JUDGMENT

James Foong JC:

The accused is charged for an offence under s. 39(B)(1) of the Dangerous Drugs Act punishable under s. 39(B)(2) of the same Act.

The charge against the accused is as follows:

> Bahawa kamu pada 18 Ogos 1983 jam lebih kurang 7.30 petang di sebuah bilik di No. 34-B, Jalan Abiad, Taman Sri Tebrau, dalam Daerah Johor Bahru, dalam Negeri Johor telah mengedar dadah berbahaya iaitu heroin berjumlah 51.76 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s. 39B(2) Akta yang sama.

The facts of the case are briefly as follows:

On or about 18 March 1983 at or about 7.30 p.m. one Inspector Ahmad Mazlan (PW3) together with 2 other police personnel Mohd. Sohod and D/S Mohd. Yunus on information observed a Chinese youth suspected of trafficking in dadah at Jalan Abiad, Johore Bahru.

Following this Chinese youth, Inspector Ahmad Mazlan gained entry into a flat known as 34-B, Jalan Abiad with the consent of one Chua Joo Miang (PW4) who was the landlord of that premises.

On enquiring where the Chinese youth who just entered the flat was, PW4 showed Inspector Ahmad Mazlan and his men to a room marked E on the sketch plan tendered as Exhibit P37.

As the door to room E was not locked, Inspector Ahmad Mazlan opened the door and saw the accused in a squatting position in front of a small table. The accused as he later admitted in his own evidence was at that material time taking drugs.

From the said room E which furniture consist of only a bed and a small table, the police party recovered the following items:

1. Wrapped in newspaper one plastic bag which had 31 small plastic packets (P8(1)-(31)) with suspected drugs therein.
2. Wrapped in newspaper is one plastic bag which had 16 small plastic packets (P12(1)-(16)) with suspected drugs therein.
3. Wrapped in newspaper one plastic bag which had 12 small plastic packets (P16(1)-(12)) with suspected drugs therein.
4. One plastic bag which had 3 small plastic packets (P19(1)-(3)) with suspected drugs therein.
5. 4 bottle covers (P22A-D).
6. 1 spoon (P23) and
7. 67 used and unused syringes and needles. (P29(1)-(10); P30(1)-(11); P31(1)-(14); P32(1)-(12); P34(1)-(13); P35(1)-(7)).

All the relevant exhibits stated above were sent to the chemistry department, Johore Bahru for analysis by the investigating officer Inspector Jasbir Singh (PW8) on 21 August 1983.

On 24 November 1983 a chemist report marked P38 was received from the chemist together with the said exhibits. This report was forwarded to the accused on or about 26 November 1983 where the accused acknowledged receipt by signing on the rear of P38. This acknowledgement is marked as Exhibit P38A.

At the close of the prosecution's case, the learned defence Counsel informed the Court that he has only one point to submit relating to the failure of the prosecution to prove its case against the accused. He relied solely on the admissibility of the chemist's report. He based his stand on the fact that the chemist is not called to testify and that the report itself was not correct.

He informed the Court that it is due to the incorrect statement in the chemist's report that led to the present trial. This case is a retrial ordered by the Supreme Court after allowing an appeal of the accused in Criminal Trial No. 10-1984 (I shall refer to this as the 1st trial). I was to learn later that the learned trial Judge found the accused guilty of an almost similar charge under s. 39(B)(1) of the Dangerous Drugs Act but of drugs besides heroin including 6 - monoacetylmorphine which at the material time was not listed as a dangerous drug under the 1st schedule of the Dangerous Drugs Act 1952.

The inclusion of 6 - monoacetylmorphine in the charge sheet of the 1st trial was most likely due to the statement made by the chemist on the last page of the chemist's report which the chemist states as follows:

> Heroin and 6 - monoacetylmorphine are 'dangerous drugs' as defined in s. 2 of the "Dangerous Drug Act 1952." 6 - monoacetylmorphine is an ester of morphine as in Part III of the First Schedule to the above Act.

In the present case, the 6 - monoacetylmorphine is left out of the charge and the accused is only charged for trafficking in heroin. (6 - monoacetylmorphine has since been listed as a dangerous drug under schedule 1 of the Dangerous Drugs Act.)

This same chemist's report used in the 1st trial is now tendered as evidence and marked by this Court as P38. The learned Deputy Public Prosecutor felt that there is no necessity to call the chemist and based her stand on the contention that since the chemist's report was served well within the time limit stated in s. 399 Criminal Procedure Code and that since the defence has not given notice to object to the said report to warrant calling the chemist, the report is admissible. There is no necessity of re-serving the same report on the accused in respect of this retrial.

As this point was argued at length by both prosecution and defence, I would reproduce s. 399 of the Criminal Procedure Code which reads as follows:

> (i) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (ii) of this section upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person or Registrar shall be required to attend as a witness:
>
> (a) by the Court; or
>
> (b) by the accused, in which case the accused shall give notice to the public prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the public prosecutor intends to give evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.

(ii) The following are persons to whom the provisions of this section apply:

(a) officers of the Institute for Medical Research;

(b) Government Medical Officers;

(c) chemist in the employment of any government in the federation or of the Government of Singapore;

(d) any person appointed by the minister by notification in the gazette, to be a document examiner;

(e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in the federation; and

(f) any person or class of persons to whom the minister by notification in the gazette declares that the provisions of this section shall apply.

(iii) The person referred to in subsection (ii) of this section and the Registrar of criminals are by this Code bound to state the truth in reports made under their hands.

After careful reading of s. 399 of the Criminal Procedure Code, I find that there is no necessity for the prosecution to reserve the chemist's report on the accused for this retrial. This chemist's report was the same report served on the accused some 7 years ago before the 1st trial and as the accused is the same person and there has been no alteration to the chemist's report, there is no necessity of re-service. The chemist need not be called to testify if the accused has not tendered the 3 days' notice before trial of this case requiring his attendance as provided for under s. 399 of the Criminal Procedure Code.

In this case the defence has not tendered notice to call the chemist. In fact when this report was tendered to the Court, I did ask the defence Counsel whether he has any objections and he replied no.

Under such circumstances I do not see how the defence can deny the admissibility of this report at this stage.

In coming to this conclusion I agree with the decision of Mr. Justice Syed Othman (as he then was) in the case of *Mohamed bin Abdul Rahman v. PP* [1979] 1 MLJ 252.

In that case the defence tendered notice requiring the attendance of the chemist. The prosecution at trial failed to call the chemist and the Court admitted the chemist's report without any objection from the defence Counsel. It was held that the silence and inaction of the defence in objecting to the report was construed as a withdrawal or waiver of the notice and it has no objection to the report being admitted.

Further, after perusal of the said chemist's report, I am of the view that there are no major flaws in the analysis. The analysis on heroin are clearly spelled out with individual weight classified thereto, 6 monoacetylmorphine the other substance found therein, are clearly distinguished in the report. As this case only concerns the drug heroin, the chemist's report is clear and to the point on this matter.

Though the defence Counsel hardly submitted on and challenged the evidence relating to custody and control of the drug found, I have taken upon myself to scrutinise the evidence to determine whether the prosecution has made out a case against the accused.

After careful consideration I find that the accused has the custody and control of the heroin and other exhibits tendered in Court so found in the said room E.

The accused was the only person in the said room at the material time. According to the landlord (PW4) and his wife (PW5) the accused was the sole sub-tenant to the said room E and there were no other person or persons who visited the accused in the said room.

The drugs and other exhibits were in close proximity to the accused and from facts and inferences, I find that the accused was in possession of the said drugs. Under s. 37(d) of the Dangerous Drugs Act, the accused is deemed to have known the nature of the said drugs until the contrary is proved.

When defence was called the accused's Counsel tendered evidence to show that the accused was a drug addict since 1973. When he was 15 to 16 years old his father admitted him to Tanjong Rambutan hospital for treatment at the recommendation of a doctor at General Hospital Ipoh. However unable to withstand the withdrawal symptoms he ran away from the Tanjong Rambutan hospital. He was subsequently readmitted to the same hospital but not long after he ran away again.

Subsequently, in 1977 he was arrested and charged in the Ipoh Court for possession of a straw of heroin found in his cigarette box. In respect of this offence, he served 1 year jail sentence.

After his release from prison his brother-in-law rendered him assistance by giving him a job in his firm in Singapore as a wireman. This according to his brother-in-law (DW3) was to assist the accused from being away from drugs since it was more difficult to obtain drugs in Singapore. However, due to the fact of not having a work permit, the accused had to return to Johore Bahru to have his passport stamped for re-entry twice a month. While in Johore Bahru he got into smoking drugs again. According to the accused he was subsequently not allowed into Singapore due to his failure to pass a drug urine test conducted by the Singapore authorities at the Singapore customs check point.

In 1982, he was again arrested by the police in Johore Bahru for smoking drugs but after a detention of about 2 weeks he was released without being charged for any offence.

The accused gave a lengthy account of how heroin is being taken with different grades heroin.

The accused also stated that he needed 4 to 5 injections of heroin a day and each injection will be effective on him for 4 to 5 hours.

He admitted that all the exhibits so found in room E on that day belonged to him but stated that all these were for his own consumption. He did not sell any of the drugs.

The accused also gave evidence to say that in order to supplement his purchase of drugs, he asked for money from his sister who lived in Singapore and who gave him a few hundred dollars at a time. With this and any spare cash he had, he will purchase drugs for fear that he may not be able to find the supplier.

All these evidence are adduced with the intention of disproving that he was a drug trafficker.

After careful consideration of all evidence before this Court, I find that the accused has failed to rebut the presumption that 51.76 gms. of heroin in his possession were for his own personal consumption.

My finding is based on the following facts;

Firstly, the amount of heroin is substantially large in quantity to justify personal consumption. There is no necessity for the accused to possess so much of heroin for his own consumption in view that he could have purchased it when he required them.

Secondly, the heroin so found were contained in numerous small plastic packets, 62 in number. The accused explained that these packets were separately kept for the purpose of differentiating them into grades for different method of consumption. I find that this is rather an unusual way of storage for personal consumption since it would be easier to store them in different larger containers. These small packets are more likely to be for sale in the streets.

Thirdly, besides the heroin there are also 67 syringes with needles. Why would the accused be in possession of so many, when according to the accused these syringes and needles were easily available from any Chinese medicine shop. The accused's explanation that it is cheaper to buy by the dozen can hardly justify;

a) a person's fear of possessing them in case of being incriminated for trafficking in drugs and

b) his priority in spending all his money on drugs rather than on accessory of which one or two syringes and needles would be sufficient.

Further, since the syringes and needles were no longer of use, one would expect it to be disposed off quickly rather than it being kept. All these evidence points to trafficking instead of self consumption.

Fourthly, there was no evidence adduced to show that the accused was a chronic addict and that he required a substantial amount of heroin each day for consumption. Though the record officer of Tanjong Rambutan hospital (DW4) was called, the evidence tendered only goes to prove that the accused was admitted for drug treatment some 7 years before the offence. I wish to state that once the presumption of trafficking is evoked, it is up to the accused to rebut it with evidence of a substantive and qualitative nature, relating and relevant to the matter. In this case in the light of the evidence adduced the accused failed to rebut this presumption of trafficking. The accused has failed to justify the defence of self consumption as laid down in the Supreme Court decision in the case of *Cohen Lorraine Philis & Anor. v. PP* [1989] 1 CLJ (Rep) 18.

In the light of the surrounding circumstances and facts of this case, I further wish to add that though the accused is a drug addict it does not mean that he is not a trafficker.

I therefore find the accused guilty of the offence as charged.

After hearing mitigation I sentence the accused to death as laid down by law.

Also found at [1990] 2 CLJ 656